Supreme Court, U.S.
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No. 02-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

SCANNED

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

PARTIES TO THE PROCEEDING

The sole petitioner in this case, Jeff Groh, is an agent with the United States Bureau of Alcohol, Tobacco, and Firearms. Petitioner is a defendant in this case and was an appellee in the court below. Also named as defendants in this case were unnamed agents of the United States Government; Butte-Silver Bow County, Montana; John McPherson, the Sheriff of Butte-Silver Bow County; Joe Lee, the Undersheriff of Butte-Silver Bow County; and unnamed officers of Butte-Silver Bow County, none of whom is a party to the case before this Court. Petitioner is an individual who was sued in his individual capacity, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Joseph, Julia, Joshua, and Regina Ramirez are the plaintiffs in this case and were the appellants in the court below.

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INTRODUCTION

The constitutional question here raises two distinct issues. The threshold issue is whether the faulty notation contained in this warrant necessitates a judgment that the Fourth Amendment was violated. In the totality of the circumstances here, where the application and affidavit fully established probable cause and specified with particularity the items to be seized, where the search conformed to the parameters previously documented to the magistrate, and where respondents were fully informed of those parameters, no violation of the Fourth Amendment occurred. The further issue in this civil case is whether *petitioner himself* violated the constitutional rights of the respondents by the manner in which he executed the search of their premises. In the situation here, where the officer properly applied for a warrant, provided sufficient particularity in the application, obtained authorization from a neutral magistrate, executed the search in accordance with the correct parameters, and informed respondents upon their request of those parameters, petitioner's own actions did not violate the Fourth Amendment. To the extent that there was error here, the error lay in the wording of the court order constituting the judicial warrant – for which the magistrate, not the officer, is ultimately responsible. In addition, the Court's precedents strongly suggest that public officials are not personally liable for constitutional violations based on an alleged lack of due care.

Moreover, even if the Court were to decide that the Fourth Amendment was violated in this case, petitioner is entitled to qualified immunity. This result obtains under both of the two independent bases for granting qualified immunity that the Court has recognized. First, at the time petitioner engaged in this search, the law was not clearly established (in fact, no court had held) that the "leader" of a search who applied for the warrant is required to proofread the warrant after the magistrate has issued it, as the court of appeals held. Likewise, the law was not clearly established on whether the officer may cure a particularity defect in the warrant by providing a verbal description to the property owner at the scene of the specific items delineated in the application and the affidavit that the

magistrate approved. Second, and in the alternative, officers are not subject to personal liability for reasonable mistakes of fact, such as the proofreading error that petitioner made here, even if their mistakes may result in a violation of clearly established law. For any and all of these reasons, the decision below should be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a-12a. That opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to the defendants in a ruling that upheld petitioner's defense of qualified immunity. The District Court's opinion, which is unreported, is reprinted at Pet. App. 13a-25a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *See id.* at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rehearing *en banc* on July 25, 2002. Pet. App. 3a. This Court granted a timely request for extension of the time within which to file a petition for certiorari, which was extended to and including November 22, 2002. *See id.* at 36a. The petition for certiorari was filed on November 22, 2002, and the petition was granted on March 3, 2003. *See* J.A. 48. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Search Warrant and Its Execution.

This lawsuit stems from an investigation of respondents by the United States Bureau of Alcohol, Tobacco and Firearms. The investigation occurred after federal officials received complaints and information from concerned citizens who indicated that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a.

The petitioner in this case is Jeff Groh, who serves as a special agent for the Bureau. In May 1996, petitioner received two reports that the Ramirezes kept automatic weapons and grenades on their ranch. *See id.* at 14a. Petitioner met with Mr. Ramirez, who showed him around the premises; no illegal weapons were in evidence, and the visit ended amicably. *See id.* In February 1997, the undersheriff for the county passed on to petitioner a report from a frequent visitor to the Ramirez household that the Ramirez family had automatic weapons, grenades, a grenade launcher, and a rocket launcher on their property. *See id.* at 14a-15a.

In an effort to obtain evidence concerning these allegations, petitioner sought a warrant to search the Ramirez property. He prepared an application for a search warrant and a supporting affidavit, and presented them to a magistrate judge who issued a judicial warrant. The application properly described the place to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. *See* Pet. App. 28a; *see also id.* at 30a-35a (elaborating basis for showing of probable cause). Nonetheless, the judicial warrant itself, which petitioner filled out for the magistrate in the first instance, omitted the latter information: in the space provided in the court's order for listing the items to be seized, the warrant

mistakenly included only a description of the Ramirez home. *See id.* at 26a. The judicial warrant made two direct references to petitioner's affidavit, and noted that the information in the affidavit provided the basis to "establish probable cause . . . and establish grounds for the issuance of this warrant." *Id.*

On March 4, 1997, petitioner accompanied other agents from the Bureau, along with the county sheriff and members of the county sheriff's department, to the Ramirez ranch in order to execute the warrant. When the officers entered the home, only Mrs. Ramirez was present. Petitioner told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." *Id.* at 4a. He also orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See id.* at 15a. The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the legal firearms that they found there. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant without the application or the affidavit, which had been filed under seal with the court. Nothing was seized, and no charges were ultimately filed against respondents. *See id.* at 4a, 15a.

The next day, Mrs. Ramirez faxed the warrant to her attorney, who called petitioner and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Petitioner replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized. *See id.* at 15a.

B. The District Court Proceedings.

The Ramirezes sued petitioner and the other officers who participated in the search under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983, alleging violation of their rights under the First, Fourth, Fifth, and Ninth Amendments and under Montana law. The principal *Bivens* claim was that the officers violated the Fourth Amendment by

undertaking a search of the Ramirez property pursuant to a defective search warrant. *See* Pet. App. 2a. Petitioner and the other defendants moved to dismiss all of the claims, or in the alternative for summary judgment, raising the defense of qualified immunity. *See id.* at 13a-14a.

The District Court treated the motion as one for summary judgment and ruled for the defendants. The court first held that there was no constitutional violation.[1] The court noted that it was undisputed that: (i) the particulars of the description provided in the warrant application were accurate and adequate; (ii) the officers participating in the search possessed accurate knowledge of what items they were looking for; (iii) plaintiffs themselves knew what items the officers sought based on the officers' verbal description at the scene; and (iv) petitioner faxed them the relevant portions of the application "showing the correct description of items to be seized, when he was notified of the mistake." Pet. App. 21a. Likening this case to "cases in which warrants contain inaccurate addresses," the court concluded that "[s]uch warrants do not necessarily violate the Constitution" merely because they are facially defective in particularity, unless the broader context shows the search to be unreasonable, which it was not here. *Id.* at 22a.

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[1] The District Court briefly noted a concession made at oral argument "that the warrant did violate the Constitution," Pet. App. 22a n.4, but pointed out that this was not the position taken in the defendants' brief, *see id.* As discussed above, the court decided the threshold constitutional issue, holding that the Fourth Amendment was not violated here. *See id.* at 20a-22a. This is the correct procedure in cases involving qualified immunity claims. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 839-55 (1998) (resolving qualified immunity case by deciding only constitutional due process issue); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). In any event, there is no issue of waiver here because petitioner renewed his argument on the constitutional claim before the Court of Appeals, *see* J.A. 32-47 (excerpt from Federal defendants' brief), the Ninth Circuit expressly considered and decided that issue, *see* Pet. App. 5a-7a, and respondents did not raise any waiver issue in their brief in opposition to the petition for certiorari, which is when they would have been required to address the issue, *see, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

In the alternative, the District Court upheld the defense of qualified immunity. The court correctly recognized that there was *no* authority – binding or otherwise – holding that petitioner's conduct violated the Fourth Amendment at the time that he had acted. Although respondents argued that "each officer participating in the search . . . had an independent obligation to examine the warrant," they cited no "authority for that proposition, nor can I find cases to support it." Pet. App. 23a. In the alternative, the court held that the defendants' conduct met "the same standard of 'objective reasonableness' that it would apply in a suppression hearing." *Id.* at 22a. In its view, "constitutional tort liability does not take aim at technical defects unless and until they rise to the level of substantive deprivations." *Id.* at 23a. Because petitioner showed probable cause to support the warrant and followed "all the established procedures" in carrying out the search, he "acted in an objectively reasonable manner" and was entitled to qualified immunity. *Id.* Respondents' remaining constitutional and state-law claims were also dismissed. *See id.* at 23a-24.

C. The Decision by the Court of Appeals.

With respect to every defendant other than petitioner, the Ninth Circuit affirmed. With respect to petitioner, however, the court of appeals reversed, holding that he alone, as the "leader" of the search, had violated respondents' rights under the Fourth Amendment and was not entitled to qualified immunity. On the constitutional issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), and declined to apply this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which recognized a "good faith" exception to the Fourth Amendment where officers execute a search warrant that a judicial officer had previously approved, as was true here. *See* Pet. App. 5a-7a. In particular, the court held that petitioner's verbal description to respondents during the search could not supply the particularity that was lacking in the warrant itself, and the supporting affidavit was irrelevant unless it was produced in conjunction with the warrant. *See id.* at 6a & n.2. The court reasoned that the warrant was a judicial order, which petitioner was authorized only to execute, not to alter. *See id.* at 6a.

The Ninth Circuit relied on its subsequent decision in *McGrew* to support its finding that the Fourth Amendment was violated. That decision did not even issue until months after the search warrant was executed in this case, though the court made no mention of that fact. *See id.* at 9a. In holding that petitioner alone, among all the agents and officers who participated in the search, was not entitled to qualified immunity, the court emphasized its own factual assessment that petitioner was the "leader" of the search. In the court's view, this meant that before petitioner helped execute the search warrant, he had a constitutional obligation to proofread the warrant to discover any flaws lurking in its terms, even after it had already been approved by a judicial officer. *See id.* at 8a-10a. The court further averred that had petitioner fulfilled this newly minted constitutional obligation, he "would surely" have realized the particularity defect, even though the magistrate had failed to do so. *Id.* at 10a. In the court's judgment, petitioner's failure to reread and correct the defect in the warrant made his conduct in executing the warrant "objectively unreasonable" and stripped him of any defense of qualified immunity. *See id.*

A timely petition for rehearing was denied with minor amendments to the panel opinion, *see id.* at 3a, and this petition for *certiorari* followed.

SUMMARY OF ARGUMENT

In qualified immunity cases, the Court has made clear that the parties should first address the issue of whether the defendants violated the constitutional rights of the plaintiffs, and then proceed to discuss the grounds for qualified immunity. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding only constitutional due process issue); *County of Sacramento v. Lewis*, 523 U.S. at 833, 839-55 (1998) (same); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). Under either ground, petitioner should prevail here and his motion to dismiss should be granted.

First, petitioner did not violate the Fourth Amendment by

obtaining and executing the judicial warrant in this case. The defect in particularity in the warrant's description does not conclude the constitutional analysis. Petitioner accurately and fully specified the legal basis and scope of the search to the magistrate, and he and the other officers properly executed the search consistent with those particulars. Moreover, during the search they correctly notified respondents about the purpose and objects of the search, and they later provided respondents with the pertinent portions of the warrant application. Petitioner was acting on the authority of a judicial warrant issued upon a proper showing of probable cause and his conduct was reasonable before, during, and after the search. Under these circumstances, the purposes and demands of the particularity requirement were entirely satisfied, and the Fourth Amendment was not violated. In addition, the Court's precedents have strongly suggested that public officials cannot be held personally liable for violating the Constitution in the absence of intentional or reckless conduct, which is nowhere suggested here.

In addition, any violation of the particularity requirement that may be judged to have occurred in this case cannot be ascribed, as a constitutional matter, to petitioner himself, but rather to the magistrate who approved and issued the warrant, which is a quintessentially judicial act. A judicial warrant is a court order that commands action by other officials who are merely responsible to execute it in a reasonable manner. Here the warrant was properly issued upon a showing of probable cause, based on facts that petitioner specified with sufficient particularity, and it was only the judicial warrant that was formally defective. This difference is immaterial in criminal cases, where the issue is whether to exclude evidence from a subsequent judicial proceeding; it is crucial, however, in civil cases like this one, where the issue is whether to hold an individual officer personally liable in money damages for his or her official actions. Here petitioner properly gathered and presented the legal justification for the judicial warrant, and properly executed the search, including specifying to the property owners the particular items to be seized; the only error occurred in the wording of the court order constituting the

judicial warrant. In this situation, petitioner did not violate respondents' constitutional rights and cannot be held subject to personal liability for an alleged lack of due care in failing to proofread the warrant after it had been issued.

Second, even if the Court were to hold in this case – as a matter of first impression – that a defect in particularity in the warrant (but not the application and supporting affidavit) cannot be cured at the scene, and that a defect in a judicial warrant is the constitutional responsibility of the chief executing officer (but not the other officers), petitioner is entitled to a defense of qualified immunity here. At the time he acted, it was not apparent in the light of preexisting law that his conduct violated the Constitution. Indeed, the practice of correcting defects in the text of a warrant at the time of execution in order to conform to facts already specified to the issuing court is widespread, and such legal authority as existed at the time had generally upheld its validity. Even in the last few years, the most recent lower court opinions reveal deep divisions among judges over the question of whether these actions violate the Fourth Amendment at all. And there was simply no authority whatsoever for the novel "duty to proofread" that the court of appeals devised here. In these circumstances, to require law enforcement officers, or any public officials, to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the settled purposes of the qualified immunity doctrine.

Moreover, petitioner also is entitled to qualified immunity on an entirely separate basis. The Court's precedents hold that officers are not subject to personal liability for reasonable mistakes of fact, even if their errors may result in a violation of clearly established law. Where the officers' conduct is "objectively reasonable," measured under the same analysis that applies to the *Leon* "good faith" rule, qualified immunity is appropriate. In this case, in particular, petitioner's conduct in applying for the warrant and executing the search of respondents' ranch met this standard of "objective reasonableness," and he is thus entitled to qualified immunity.

ARGUMENT

Petitioner will begin by addressing the constitutional issue posed here, which is one of first impression, and show why he did not violate the Fourth Amendment. Petitioner then will proceed to discuss the controlling law that supports his defense of qualified immunity in this case. *See, e.g.*, *Wilson*, 526 U.S. at 617 (explaining the proper ordering of arguments in qualified immunity cases).

I. PETITIONER DID NOT VIOLATE THE FOURTH AMENDMENT BY HIS ACTIONS IN OBTAINING AND EXECUTING THE WARRANT.

Petitioner did not violate the Fourth Amendment in this case, for two reasons. First, the defect in the warrant here must be evaluated against the totality of the circumstances in which this search was performed. In that context, petitioner's actions were reasonable and they did not infringe any of respondents' constitutional rights. Moreover, the Court has made clear that public officials are not personally liable for constitutional violations based on an alleged lack of due care. Second, if a constitutional violation were to be founded upon the defect in this warrant, the actual responsibility for that defect properly lies with the magistrate judge who issued the court order comprising the judicial warrant; it does not properly lie with the officers subject to its commands, who merely executed its terms and did so in a reasonable manner here.

A. Although the Warrant Lacked Particularity, the Fourth Amendment Was Not Violated.

In retrospect, as the defendants conceded below, *see* Pet. App. 6a, the warrant in this case was deficient in particularity because it provided no description of the type of evidence sought. The Court's precedents make clear, however, that a shortcoming in the details of a warrant does not necessarily create a violation of the Fourth Amendment. On the contrary, the constitutional provision is not violated unless it is shown that the deficient description in the warrant actually led to an unreasonable search or seizure that constituted an infringement

upon the complaining party's substantive rights. *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987) (officers who acted reasonably in executing a warrant that appeared valid when issued, but turned out to be overbroad, did not violate the Fourth Amendment); *cf. Hill v. California*, 401 U.S. 797, 803-04 (1971) (warrantless arrest of wrong man based on reasonable mistake of fact did not violate the Fourth Amendment).

As discussed below, there was no violation of the Fourth Amendment in the circumstances of this case. Petitioner provided the magistrate with a complete and detailed description of the places to be searched and the items to be seized. He obtained a warrant after justifying the proposed search upon a valid showing of probable cause. The search was carried out entirely within the boundaries of the parameters previously documented to the court. When respondents requested more information, they were promptly and correctly notified about the purposes and objects of the search, both verbally and later in writing. The search itself was conducted in a reasonable fashion, and the goals served by the particularity requirement were fully met. Finally, the Court has made it clear that public officials cannot violate the Constitution when their actions, at most, amount to some degree of negligence, as is alleged here.

1. Petitioner Here Sought and Obtained the Warrant by a Proper Showing of Probable Cause, Based on Particulars that Were Sufficiently Specified to the Magistrate.

Petitioner sought and obtained the search warrant at issue in this case based on substantial information that was amassed during an on-going investigation of complaints from concerned citizens and local officials. Several informants had told officials that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a. The prohibited items allegedly present on the ranch included automatic weapons, grenades, a grenade launcher, and a rocket launcher. *See id.* at 14a-15a. It is undisputed that the possession and use of such items violates federal law. *See, e.g.*, 18 U.S.C. § 922(o) & 26 U.S.C. § 5861.

Petitioner paid one consensual visit to the ranch that turned up no evidence of any such prohibited items. More than a year later, in response to the disclosure of further information reinforcing the same concerns, petitioner sought a warrant to search the Ramirez property. *See* Pet. App. 30a-33a. He prepared an application for a search warrant and a supporting 18-paragraph affidavit, which supplied considerable detail concerning the information that had been received about the alleged weapons located on the ranch. *See id.* at 28a-35a. The application properly described the place to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. *See id.* at 28a.

It is uncontested that the information that petitioner included in the application and the supporting affidavit supplied ample basis for the requisite showing of probable cause to search respondents' ranch. *See id.* at 30a-35a (elaborating basis for showing of probable cause). As a result, when petitioner presented all of this supporting information to the United States District Court for the District of Montana, the magistrate judge made the determination of probable cause and issued a judicial warrant authorizing the requested search. *See id.* at 26a-27a. The judicial warrant constituted a court order commanding petitioner and any authorized officer of the United States to conduct the requested search during daylight hours on or before a specified date. *See id.* The judicial warrant made two direct references to petitioner's affidavit, and noted that the information in the affidavit sufficed to "establish probable cause . . . and establish grounds for the issuance of this warrant." *Id.* at 26a, 27a.

It is further uncontested here that the application and affidavit which petitioner submitted to the court contained sufficient detail to satisfy the particularity requirement of the Fourth Amendment. Nonetheless, the judicial warrant itself omitted the detailed information contained in the application and affidavit about the items to be seized: in the space provided in the court's order for listing the items to be seized, the warrant included only a description of the Ramirez home. *See id.* at 26a.

In keeping with common practice, and as an aid to the court, petitioner apparently had filled out a proposed warrant form and inadvertently inserted a description of the residence in the space provided for the court to specify the items to be seized. *See id.* at 4a. The magistrate, in turn, failed to notice the omission and incorporated the error into the court's order.

As the District Court summarized the problem, the upshot is that the warrant included "a typographical error . . ., an error undetected by either [petitioner] or Magistrate Judge Holter." *Id.* at 23a. Nonetheless, there is no dispute in this case that petitioner sought and obtained the warrant by a proper showing of probable cause, based on particulars that were sufficiently specified to the magistrate judge. As this Court has observed in a very similar context, "[a]t this point, a reasonable police officer would have concluded, as [petitioner] did, that the warrant authorized a search for the materials outlined in the affidavit." *Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984).

2. The Officers Acted Reasonably During the Search and Observed the Parameters Already Documented to the Magistrate.

In evaluating the reasonableness of petitioner's conduct for Fourth Amendment purposes, it is significant also that in executing the search warrant in this case, petitioner and his fellow officers did not exceed the parameters of the search specified in the detailed information petitioner had submitted to the court in the original application and affidavit. The error, in other words, lay only in the nonconformity of the warrant to the application and affidavit.

The search of respondents' ranch took place within the time frame specified in the warrant, occurred during daylight hours, and was conducted in a reasonable manner.[2] The officers

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[2] The officers did permit a media crew to stand just outside the Ramirez' property and videotape their activities during the search. *See* Pet. App. 15a. Yet this search was conducted before the Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), which disapproved of media accompanying police into

searched the ranch, the home, and the outbuildings only for illegal weapons and explosives. No illegal weapons were found, nothing was seized, and no charges were ultimately filed.

The Court has held that "the purposes justifying a police search strictly limit the permissible extent of the search." *Garrison*, 480 U.S. at 87. Therefore, it is important to note here that petitioner acted in compliance with the purposes justifying this search, which he had already fully documented on the record to the magistrate who issued the warrant. *See, e.g.*, *Wilson*, 526 U.S. at 611 (Fourth Amendment requires "that police actions in execution of a warrant be related to the objectives of the authorized intrusion"). Although in retrospect the warrant that the court issued in this case was deficient in its description of the items to be seized, the Court "has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Garrison*, 480 U.S. at 87.

3. Petitioner Acted Reasonably by Informing Respondents of the Items to Be Seized and the Goals Served by the Particularity Requirement Were Satisfied Here.

At the time that petitioner and the other officers executed the warrant and entered the Ramirez home, they orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See* Pet. App. 15a. Once again, the description given to respondents accorded with the particulars that petitioner had specified to the court in the original warrant application and supporting affidavit. These facts are undisputed. *See id.* They also left the warrant with Mrs. Ramirez. The next day, upon request from respondents' attorney, petitioner faxed him the page of the application that contained the full list of items to be seized. *See id.* at 15a-16a.

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a private residence, and in any event it is not at all clear that videotaping the scene from outside the property would be prohibited under that decision. Nor is this aspect of the officers' conduct at issue in the case before this Court.

It thus is clear that, notwithstanding the formal defect in the warrant, both the magistrate and respondents were fully informed of the particular items to be seized. In this light, "[w]hen judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,'" petitioner's conduct in this case was "reasonable and valid under the Fourth Amendment." *Hill*, 401 U.S. at 804-05 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (Rutledge, J.)). Petitioner's actions throughout the course of this prolonged investigation, in the application process for judicial permission to proceed with a search, and during the execution of the search, were in almost every respect beyond reproach. The only mistake he appears to have made was inadvertently to omit certain information in the draft warrant form, though he had included the same information in extensive detail in the application and affidavit that he submitted to the court. Neither he nor the magistrate noticed the omission at the time that the court issued the warrant. This shortcoming is simply insufficient to ground a violation of the Fourth Amendment. As the Court has plainly declared, "we have not held that 'reasonableness' precludes error with respect to those factual judgments that law enforcement officials are expected to make." *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990).

It should be underscored, moreover, that the court of appeals did not rely on petitioner's omission of the items to be seized in the warrant form he drafted for the magistrate. Indeed, that fact had no bearing on the court's analysis of the issue under review here. Rather, it was petitioner's failure as "leader" of the search to *proofread* the warrant, after the magistrate had approved it, that was held to violate the Constitution. *See* Pet. App. 8a. The result and analysis would be unchanged if another officer, or indeed the magistrate, had drafted the warrant in the first instance. It still would have fallen to petitioner, under the court's analysis, to double check the magistrate's handiwork.

The Court has recognized that in the fast-moving and often jumbled realm of law enforcement, mistakes do happen and it is not unreasonable for an officer to rely on the presumed

correctness of court orders. Here, as in other situations arising under the Fourth Amendment, "[o]fficers can have reasonable but mistaken beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz*, 533 U.S. 194, 206 (2001); *see also Hill*, 401 U.S. at 804 ("sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment"); *Sheppard*, 468 U.S. at 989 (rejecting argument that the officer "should have examined [the warrant] to make sure that the necessary changes had been made").

In particular, here it was objectively reasonable for petitioner to assume, without stopping to reconfirm, that the judicial warrant issued by the court authorized the search in accordance with the terms of his application. The Court has explicitly addressed this issue elsewhere and held that it was reasonable for "the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and . . . had good reason to believe that the warrant authorized the seizure of those items" to act on that basis. *Sheppard*, 468 U.S. at 989 n.6. As the Court put the point: "We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.*

Moreover, the goals served by the particularity requirement – to prevent general searches, to prevent the seizure of one thing under a warrant describing another, and to prevent warrants from being issued on vague or dubious information – were fully satisfied here. "The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Garrison*, 480 U.S. at 84.

Those purposes were fully met in this case. Here petitioner

had completely and accurately documented the objects of the proposed search in his warrant application and affidavit that he submitted to the court. *See* Pet. App. 28a-35a. Any variance in the actual search from these parameters could be monitored and redressed. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976) (holding that checkpoint stops are permissible, even without the judicial authorization of a warrant, because their reasonableness turns on factors, such as location and method of operation, that are available for "post-stop review"). Certainly it is not ideal for a warrant to contain errors that reduce its precision, but in practice such problems do arise, and the constitutional question here is whether such mistakes inevitably render the ensuing conduct unreasonable *per se* under the Fourth Amendment. The Court has already answered that question in the negative. *See, e.g.*, *Garrison*, 480 U.S. at 84-89 (defect of particularity did not cause ensuing search to violate Fourth Amendment); *Sheppard*, 468 U.S. at 990 n.7 (depreciating consequences of defect in particularity where, as is true in this case, "if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid").[3]

In sum, both during and after the execution of the warrant in this case, petitioner fully apprised respondents of the purpose and objects of the search. Moreover, the account he provided to them included, both orally and in writing, reference to the detailed information that he had provided to the court in the original warrant application and supporting affidavit. On the whole, in the circumstances presented here, petitioner's conduct was both "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990.

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[3] The Court has also explained that certain items, such as books and papers that contain mental impressions, may merit greater protection when they are the objects of a government search. *See, e.g.*, *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (books); *Boyd v. United States*, 116 U.S. 616, 622-38 (1886) (private papers). Here, however, there were no such concerns, as the objects of this search were illegal weapons and dangerous ordnance.

B. Any Constitutional Violation Here Was the Responsibility of the Magistrate Who Erred in Issuing the Judicial Warrant, Not the Officers Who Executed It in a Reasonable Manner.

The constitutional issues framed here are grounded entirely on the formal deficiency in the text of the judicial warrant. A judicial warrant is a court order, issued by a neutral magistrate, that commands government officers to execute certain acts. *See, e.g.*, Pet. App. 26a-27a. Although the officers act as witnesses to establish the basis for issuing the warrant and as executors to carry out its commands, the warrant itself is an order issued by a court, for which the court and its own judicial officers are ultimately responsible. In this civil case, in particular, if the Court were to find that the defects in the judicial warrant created a violation of the Fourth Amendment, it would be utterly inappropriate to impose personal liability in money damages upon the executive officers who actually performed the search in a reasonable manner.

1. The Court Had Probable Cause to Issue the Warrant, Based on Facts Specified with Sufficient Particularity, So Petitioner Should Not Be Held Liable for Its Defects.

The judicial warrant issued by the magistrate judge did not conform to the application and the supporting affidavit testimony submitted by petitioner, which specified the evidence sought with sufficient detail to justify the search of respondents' ranch and to comply with the Fourth Amendment. *Compare* Pet. App. 26a-27a (judicial warrant) *with id.* at 28a-35a (warrant application and supporting affidavit). Indeed, the warrant application completed by petitioner described the items to be seized as "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." *Id.* at 28a. That description, as provided in writing to the court, is a model of particularity; taken together with the more comprehensive

explanation set out in the attached affidavit, this documentation clearly provided probable cause to issue a warrant for the proposed search. As a constitutional matter, any error that occurred in the court's order here was the magistrate's sole responsibility, and it cannot provide a basis for holding the officers personally liable in money damages.[4]

In *Sheppard*, the Court presented the core insight that governs the situation presented here: "An error of constitutional dimension may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake." *Id.* at 990. In fact, the central purpose of denying qualified immunity in *Bivens* actions to enforce the provisions of the Fourth Amendment, as with the exclusionary rule, is "to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Illinois v. Gates*, 462 U.S. 213, 263 (1983) (White, J., concurring). Ultimately, it is "the magistrate's responsibility" to "issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 U.S. at 921.[5] The officer may try to be helpful by providing a draft order, but he does not thereby take on a constitutional responsibility, on pain of personal liability, to oversee proper completion of the judicial function.

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[4] This is not to deny that petitioner's oversight when he submitted a draft of the judicial order contributed to the ultimate defect in the warrant. But the act of drafting a judicial order does not transfer constitutional responsibility from the court to the draftsman, and any rule to the contrary would be unworkable and revolutionary.

[5] In *Leon*, the Court further noted that "[o]ur discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. *Cf. Massachusetts v. Sheppard*, 468 U.S. at 989, n.6 ("[I]t was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested")." *Leon*, 468 U.S. at 918 n.19. In this case, of course, petitioner and the other officers did just that: they executed the warrant in accordance with the parameters they had specified to the court in the warrant application and supporting affidavit. *See supra* Part I.A.2.

2. The Fourth Amendment Does Not Require Officers to Proofread Judicial Warrants Issued with Probable Cause.

The court below imposed a novel "proofreading" requirement on some but not all of the officers involved in executing a warrant (including petitioner in this case). *See* Pet. App. 5a-10a. No such requirement can be squared with this Court's own precedents, nor could it have been foreseen by an officer in the field.

The Court addressed strikingly similar circumstances in the *Sheppard* case – a case that was never discussed or even mentioned by the court below. In *Sheppard*, as here, the court issued a warrant that did not describe with particularity the items to be seized. The problem in *Sheppard* was that the officers had adapted a warrant form used to conduct a search for controlled substances, and failed to make the necessary changes to convert that template into a warrant form appropriate to undertake a search for evidence in a homicide investigation. The judge decided to issue the warrant, and indicated that he had made the necessary changes. The officers then executed the warrant in accordance with the terms they had specified to the judge, based on their reasonable belief that the judge had issued the warrant with the necessary corrections to render it valid in all of its details. In that posture, this Court defined the Fourth Amendment issue as "whether there was an objectively reasonable basis for the officers' mistaken belief" that "the search they conducted was authorized by a valid warrant," and determined that there was. *Id.* at 988.

In analyzing the issue, the Court concluded that "[t]he officers in this case took every step that could reasonably be expected of them." *Id.* at 989. In particular, the Court strongly rejected the contention that the officers had any duty to recheck a judicial warrant after the court had issued it to make sure that all the particulars were correct. In the critical passage for the issue presented here, the Court reasoned as follows:

> [Plaintiff] contends that, since [the officer] knew the warrant form was defective, he should have examined it to make sure that the necessary changes had been made. However, that argument is based on the premise that [the officer] had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made. Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, *we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.*

Id. at 989-990 (emphasis added). *See also Illinois v. Krull*, 480 U.S. 340, 349 (1987) ("the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it").

The Court did recognize that in certain situations, it might be sensible to expect officers to review the warrant before they execute it. But where, as here, the officers involved in the search already had specified its scope to the magistrate, the Court held that they were under no such further obligation. In this connection, the passage bears repeating in full:

> Normally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of the search. In this case, [petitioner], the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items. Whether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested.

Sheppard, 468 U.S. at 989 n.6. *Sheppard* thus rejected the

notion of a constitutional "duty to proofread," which the court below unilaterally and retrospectively imposed on petitioner. Nor do the policies behind the particularity requirement, or the Fourth Amendment as a whole, justify its imposition.

II. PUBLIC OFFICIALS CANNOT BE HELD PERSONALLY LIABLE FOR VIOLATING THE FOURTH AMENDMENT BASED ON AN ALLEGED LACK OF DUE CARE.

In a variety of settings, the Court has refused to impose civil liability on public officials for constitutional violations based on an alleged lack of due care. In *Daniels v. Williams*, 474 U.S. 327 (1986), for example, the plaintiff was a prisoner who was injured when he fell on a prison stairway. Blocked from suing the prison officials in state court, he sued in federal court, claiming that he was being deprived of "due process of law." In evaluating this claim, the Court left open "the possibility that there are other constitutional provisions that would be violated by mere lack of care," but held that "such conduct does not implicate the Due Process Clause of the Fourteenth Amendment." *Id.* at 334. This provision is "simply not implicated by a negligent act of an official causing unintended injury to life, liberty, or property," as historically it "has been applied to deliberate decisions of government officials." *Id.* at 331. *See also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (same).

As the Court noted in *Daniels*, the same higher threshold has been maintained for other constitutional claims as well. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the standard of civil liability for government officials under the Eighth Amendment requires a showing of "deliberate indifference." *Id.* at 104. In subsequent cases, it has been clarified that "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Similarly, for constitutional claims based on the Equal Protection Clause, civil litigants are required to make a showing of "invidious discriminatory purpose." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429

U.S. 252, 270-71 & n.21 (1977).

The clear tenor of the Court's decisions is that only rarely, if at all, will public officials be held personally liable for constitutional violations based only on some degree of negligence. Indeed, the Court has never authorized liability against a government official for a constitutional violation based on an alleged lack of care. Justice Brennan once stated the prevailing rule in just this manner: "in order to prevail in any *Bivens* action, recipients such as respondents must both prove a deliberate abuse of governmental power, rather than mere negligence." *Schweiker v. Chilicky*, 487 U.S. 412, 447 (1988) (Brennan, J., dissenting) (citing *Daniels*).[6]

The same principles should apply under the Fourth Amendment: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson*, 483 U.S. at 644. Indeed, if anything, the threshold for constitutional liability should be even higher in the case of the Fourth Amendment, which is not a categorical prohibition on government action, but instead incorporates a "reasonableness" standard that acknowledges the need to balance limits on official action with effective law enforcement.

The Court's opinion in *Franks v. Delaware*, 438 U.S. 154 (1978), quite strongly suggests that the same principle obtains under the Fourth Amendment. In prescribing the analysis for

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[6] Although many of the cited cases are actions brought against state officials under 42 U.S.C. § 1983, rather than *Bivens* actions against federal officials, the Court has described the two as "counterparts." *Farmer*, 511 U.S. at 839. Although the Court has "never expressly held that the contours of *Bivens* and § 1983 are identical," it "has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors 'would be incongruous and confusing.'" *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 499 (1978)). Moreover, the Court has also held that the standards that govern qualified immunity are the same in *Bivens* actions and § 1983 cases. *See Wilson*, 526 U.S. at 609.

challenging a falsehood or omission made by an officer in a warrant application or the supporting affidavit, the Court was very clear: "allegations of negligence or innocent mistake are insufficient." *Id.* at 171. Rather, in order to obtain a hearing at all, the defendant must allege that the officer was guilty of a "deliberate falsehood or of reckless disregard for the truth." *Id.*

The line drawn in *Franks* is important here for several reasons. First, it suggests that this lawsuit, the gravamen of which is the inadvertent failure to proofread the warrant, is not a proper *Bivens* action at all. If officers cannot properly be held liable for Fourth Amendment violations based merely on an alleged lack of due care, then this lawsuit should have been dismissed at the threshold.

Franks also reinforces the conclusion reached in the preceding sections that there was no Fourth Amendment violation by petitioner in this case. It certainly calls into question the implicit holding by the court below that a defect in the text of the warrant necessarily constitutes a violation of the particularity requirement. Under the reasoning in *Franks*, an officer's innocent or negligent mistake – even one that was material to the magistrate's determination of probable cause – cannot create a constitutional violation unless it rises to the level of a deliberate or reckless falsehood. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.4(b), at 487-97 (1996). There is no obvious reason why the legal standard for evaluating alleged defects in particularity should be treated any differently, and in particular there is no reason why all such defects should be regarded as *per se* violations of the Fourth Amendment. Yet that was essentially the approach that the Ninth Circuit adopted in this case, *see* Pet. App. 4a-5a, as its analysis began and ended with the deficiency in the text of the warrant.

Under this unwieldy approach, any material misnotation – for example, a transposition of numbers in the homeowner's address – would violate the Constitution. But the particularity requirement is only one component of the Warrant Clause, which itself specifies that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const.,

amend. IV. Thus the same approach should apply to both the particularity and the probable cause requirements, and the ruling below cannot be reconciled with *Franks*.

Moreover, *Franks* is also instructive here for its reliance on the independent role of the judicial magistrate in evaluating the allegations in the affidavit. Part of the rationale for the holding in *Franks* is that "[b]ecause it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." 438 U.S. at 165 (citation omitted). *Franks* thus recognizes a division of responsibilities in the warrant process, in which the officer gathers information to support a showing of probable cause and the magistrate undertakes an independent review of that information (which would be subverted by the kind of officer malfeasance at issue in *Franks*). Although the officer may not purposely or recklessly mislead the magistrate, the officer does not serve in this constitutional scheme as the ultimate guarantor of the accuracy of the judicial warrant.[7]

The Court's precedents thus strongly suggest that petitioner cannot be held liable here for conduct that allegedly evinced a lack of due care. Accordingly, even if there had been a violation of the Fourth Amendment in the circumstances of this case – a point that we vigorously dispute – petitioner could not be held personally liable under *Bivens*.

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[7] This is another reason why the distinct questions of whether there was a Fourth Amendment violation and whether *petitioner* committed such a violation must be kept analytically distinct. *See supra* Part I.B; *see also Sheppard*, 468 U.S. at 990 ("An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake."); *Leon*, 468 U.S. at 920 ("In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgement that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.") (quotation omitted).

III. IF THE COURT HOLDS THAT SUCH CONDUCT VIOLATES THE CONSTITUTION, PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY.

The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Wilson*, 526 U.S. at 609-10. *See also infra* Part III.A.

Rather than define the legal test in this manner, the Ninth Circuit blurred the issue here by stating that "[l]aw enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances." Pet. App. 7a. We agree that "objective reasonableness" is a proper basis for invoking the defense of qualified immunity, and it is especially relevant when the defendant officials have made a mistake of fact. *See, e.g., Malley*, 475 U.S. at 345-46; *see also infra* Part III.B. But this basis serves as a separate and distinct ground for granting qualified immunity. *See, e.g., Saucier*, 533 U.S. at 205. A court must also consider the criteria of "clearly established law," and the court of appeals entirely omitted that part of the analysis in this case. By thus misstating the proper test, the court gave itself broad leeway to find petitioner liable simply for failing to "predict the future course of constitutional law," which this Court has denounced. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

A. Qualified Immunity Protects Officers Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The qualified immunity doctrine is grounded in the Court's recognition that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them or deter them from fulfilling their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Crawford-El v. Britton*, 523 U.S. 574, 579 n.2 (1998).

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Nor may a court saddle public officials with personal liability merely because it may be adamantly persuaded that its own legal judgments should have been obvious to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances is it appropriate to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly dictated by prior precedents. As the discussion in Part I, *supra*, makes clear, however, this is not such a case.

1. The Ninth Circuit Departed from This Court's Controlling Precedents When It Denied Qualified Immunity.

The ruling below sharply departed from the doctrine of

qualified immunity that the Court has developed to protect the reasonable actions of government officials. The Fourth Amendment issue raised in this case has not been definitively determined by the precedents of this Court or any other court. It presents difficult questions on the merits. It had been decided in favor of the constitutionality of petitioner's conduct in decisions rendered before he acted. And, at the time of his actions, this issue had never been decided adversely to such conduct by *any* court. In these circumstances, the Court's precedents uniformly uphold petitioner's defense of qualified immunity from the claims asserted in this lawsuit.

To guide the qualified immunity analysis, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* Thus, it is not enough simply to allege that the underlying constitutional right has been violated as a general matter; instead, the constitutional issue must be framed more narrowly in light of the specific circumstances that the official confronted at the time he or she acted. *See id.* at 640-41; *see also Saucier*, 533 U.S. at 201-02; *Wilson*, 526 U.S. at 614-15. Second, in making this determination, it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier*, 434 U.S. at 565. *See also Davis*, 468 U.S. at 192 & n.9. This Court has defined "clearly established" law to mean that some such controlling authority must have already addressed and clarified the specific legal issue at stake. *See, e.g., Wilson*, 526 U.S. at 617. Within this framework, the court below made two significant errors.

First, the Ninth Circuit largely accepted respondents'

generalized arguments that conflated the determination of an underlying constitutional violation with the applicability of qualified immunity. In *Anderson*, the Court noted that, in practice, operation of the qualified immunity standard greatly depends on the level of generality at which the relevant "legal rule" is identified. *See* 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the established defense of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at such an abstract level of generality would eviscerate the important protections that the Court affords through the doctrine of qualified immunity, and hence that approach is untenable. *Id.*; *see also Wilson*, 526 U.S. at 614-17.

The ruling below exemplifies this flaw. The Ninth Circuit held that because the text of this warrant did not satisfy the particularity requirement, the Fourth Amendment was necessarily violated and qualified immunity was rendered inapplicable. *See* Pet. App. 5a-10a. As shown above, this conclusion is inconsistent with the Court's own case law. *See supra* Part I. In addition, the court of appeals applied the very same generalized approach that the Court so strongly criticized and ultimately rejected in *Anderson*. *See, e.g.*, 483 U.S. at 639. It simply recited the fact of the facial defect and then averred that the defect was incurable. *See* Pet. App. 6a. For purposes of qualified immunity, the pertinent issue is not whether the text of this warrant violated the particularity requirement. Instead, it is whether at the time these officers were on notice, because of clearly established law, that they were constitutionally required to proofread the warrant after it was issued or that they were constitutionally prohibited from "curing" its defectiveness by providing respondents at the scene with all the relevant information (as previously documented to the court).

Second, the Ninth Circuit failed to obey, or even to discuss,

this Court's plain teaching that the law must already be clearly established at the time petitioner acted in order to defeat his claim of qualified immunity. On the contrary, in treating the Fourth Amendment issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1984), which was not even issued until September 12, 1997 – more than six months *after* the underlying search in this case had occurred on March 7, 1997. *See* Pet. App. 9a. At the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's conviction. *See McGrew*, 122 F.3d at 848-49.

The Court held squarely in *Mitchell* that it is reversible error for a court to deny qualified immunity on the basis of subsequent decisions. *See* 472 U.S. at 535. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing cases). Within days after the officials authorized the wiretap challenged in *Mitchell*, two other federal courts held such conduct to be illegal, but those decisions postdated the events in question. *See id.*

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Officials "performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The

decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.* Likewise here, the court of appeals engaged in "hindsight-based reasoning" premised on a decision that postdated the conduct at issue in this case.

2. The Ninth Circuit Erred in Its Analysis of the Prevailing State of the Law at the Time Petitioner Acted.

To the extent that the Ninth Circuit addressed the more specific decisional law in effect at the time of petitioner's search, it misstated the thrust of those decisions.

The closest of this Court's precedents on the constitutional issue here is *Sheppard*, and hence it is telling that the Ninth Circuit never discussed or even cited that case in the ruling below. Indeed, in another case the Ninth Circuit has accurately characterized the holding in *Sheppard* as "appl[ying] the good faith exception to a warrant involving a 'clerical error' by the issuing judge that resulted in a violation of the particularity requirement of the Fourth Amendment." *United States v. Luk*, 859 F.2d 667, 675 (9th Cir. 1988). That precisely describes the situation in this case. Moreover, even in *Sheppard* itself the Court simply presumed without explicitly deciding that the police conduct actually violated the Fourth Amendment. *See* 468 U.S. at 988 n.5. As discussed above, the better view of these circumstances would be that the particularity defect does not give rise to any violation of a constitutional dimension; indeed, this view is squarely grounded in the analysis forcefully presented in Justice Stevens' separate concurrence in *Sheppard*. *See supra* Part I; *see also* 468 U.S. at 960-65 (Stevens, J., concurring). At a minimum, however, the Court's own precedents cast doubt on whether petitioner violated any "clearly established" law.

The Ninth Circuit's own case law proves no more effective at clearly establishing the law either on the ability to cure a defective warrant at the scene or on the supposed duty to proofread the text of a warrant after it has been issued. As to

the former, the line of decisions cited in *McGrew* was in fact quite tenuous. In cases such as *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993), and *Luk*, the court had opened the door wide to application of the *Leon* "good faith" doctrine in cases where search warrants were found to be insufficiently particular, but the underlying affidavits contained more information to supply the deficiency. *See, e.g., Towne*, 997 F.2d at 547-50 & n.6 (rejecting a "flat rule" that a supporting affidavit must be physically attached to a warrant because the Constitution does not "draw the line between lawful and unlawful searches according to the presence or absence of a staple, a paper clip, a bit of tape, or a rubber band," and suggesting the "good faith" doctrine may apply even where the warrant does not incorporate the affidavit by reference); *Luk*, 859 F.2d at 677 n.10 ("although we noted in *Crozier* that an agent's possession of the affidavit when he conducts the search pursuant to an overbroad warrant is *evidence* of good faith, . . . we do not read *Crozier* to hold the converse: that the absence of the affidavit at the scene *precludes* a finding of good faith"); *see also United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982) (holding that a search warrant may be construed with reference to the accompanying application, but not requiring the application to accompany the warrant in all instances). Combined with this Court's settled instruction that qualified immunity and the *Leon* good faith doctrine are equivalent, *see infra* Part III.B.1, these cases gave no plausible forecast that petitioner could find himself held personally liable for the comparable conduct in this case.

Even *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), which respondents cited in their opposition to certiorari as having settled the issue, plainly failed to do so: in a footnote toward the end of that opinion, the court referred to its prior discussion in *Luk*, which had suggested that "the failure to have a limiting affidavit present at the time of a search would not necessarily preclude a finding of good faith reliance." *See id.* at 430 n.4 (citing *Luk*, 859 F.2d at 677 n.10). All the Ninth Circuit said in *Kow*, however, was that the suggestion in *Luk* "may" not be "an accurate reflection of the current status of our law," and

in the end the panel concluded that on the facts of the *Kow* case "we need not resolve any question regarding the application of the *Luk* footnote." *Id.* These tentative ruminations hardly amount to "clearly established" law.

A close examination of the ruling below and the cases cited by respondents reveals that at the time petitioner acted, no controlling decision (and indeed no decision by *any* court in the country) had ruled that his actions would violate the Fourth Amendment. Only the subsequent decisions by the Ninth Circuit in *McGrew* and in this case, and by the Third Circuit in *Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000) (excepting its holding on qualified immunity, which upheld the defense), are now to the contrary.

Moreover, the proper resolution of this question is not obvious even today (more than six years later), and many other courts continue to disagree with the Ninth Circuit's position as expressed in *McGrew* and in this case. *See, e.g., United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001) (warrant with incorrect address is defective in particularity but detail in unincorporated affidavit justifies applying the *Leon* good-faith rule), *cert. denied*, 534 U.S. 1146 (2002); *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990) (warrant containing no address; same), *cert. denied*, 498 U.S. 1094 (1991); *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998) (unattached affidavit permitted to supply the particularity that was lacking, thus showing good faith under *Leon*); *United States v. Cherna*, 184 F.3d 403, 413 (1999) (same; expressly disavowing *McGrew*), *cert. denied*, 529 U.S. 1065 (2000); *United States v. Shugart*, 117 F.3d 838, 845-46 (5th Cir.) (same; warrant stated wrong items to be seized but unincorporated affidavit had correct information), *cert. denied*, 522 U.S. 976 (1997). Indeed, in *Wilson*, the Court specifically noted that where the federal courts of appeals are split on the underlying constitutional issue, qualified immunity is proper: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of

the controversy." *Wilson*, 526 U.S. at 618.[8]

Ignoring the tangle of case law in the lower courts – which it never even acknowledged – the Ninth Circuit here forged an entirely new doctrine of liability for law-enforcement officers in Fourth Amendment cases. Picking out "the leaders of the search team" for special responsibility, the court held that such leaders "must actually read the warrant and satisfy themselves that . . . it is not defective in some obvious way." Pet. App. 8a. *No prior case* had ever rendered such a holding. Indeed, the two prior Ninth Circuit cases cited for this proposition, *see id.* at 8a-9a, had held exactly to the contrary.

In the first of these cases, *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986), the court held that officers executing a warrant must "inquire as to the nature and scope of the warrant," but stressed that "it was not necessary for all or even any of [them] to actually see the warrant," even though in that case no warrant was ever procured. *Id.* at 1375. In the second, *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), the court noted that it had not found "any authority" supporting any duty to review the details of the warrant again after the court has issued it. *Id.* at 1029. Notably, in that case the Ninth Circuit explicitly reversed the trial court's conclusion that "clearly established law imposed a duty on the officers, who had generally fulfilled their duty to become informed as to the scope of the warrant, to read or refer to the signed warrant." *Id.* at 1030.

It would be especially unjust, therefore, to deny a defense of qualified immunity in a case such as this one, where the Ninth Circuit authored new law that departed from its own settled precedents and failed even to note the Court's own contrary precedent. The Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at

[8] A further indicator of this legal uncertainty is the Court's decision to grant *certiorari* and decide the issue in this case. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to give it "the definitive answer that it demanded").

562. When the Ninth Circuit last departed from this admonition, this Court summarily reversed, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341). The availability of a defense of qualified immunity is equally clear in this case.

B. Qualified Immunity Protects Officers from Personal Liability in Damages for Making Reasonable Mistakes of Fact.

Because the ruling below fashioned legal principles and imposed legal duties that were not "clearly established" in the law at the time he acted, petitioner is entitled to qualified immunity. *See supra* Part III.A. But had the opinion below been a straightforward application of clearly established law, that still would not end the inquiry here on the applicability of qualified immunity. The Court's precedents make clear that even when officials take actions that violate clearly established law, they do not lose the protection of qualified immunity unless their conduct was objectively unreasonable under the precise circumstances. "What this means in practice is that 'whether an official . . . may be held personally liable . . . generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*, 526 U.S., at 614 (quoting *Anderson*, 483 U.S. at 639); *see also Saucier*, 533 U.S. at 207.

For example, an officer can have a reasonable though mistaken belief that a warrant contains the necessary level of particularity, and in that situation the Court has found that such conduct does not even violate the Constitution. *See, e.g.*, *Garrison*, 480 U.S. at 85-89. Yet even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable search, this Court's precedents still would operate to grant officers qualified immunity for reasonable mistakes as to the legality of their actions, as when they reasonably misjudge whether probable cause existed to justify

their search. *See, e.g.*, *Anderson*, 483 U.S. at 643; *Malley*, 475 U.S. at 344-45.

The Court has consistently indicated that though it evaluates the officer's actions "in light of" the then-existing "clearly established" legal rules, the overall inquiry remains one of objective reasonableness. *Wilson*, 526 U.S. at 614; *see also Anderson*, 483 U.S. at 641 (officer who "reasonably but mistakenly" concludes that probable cause is established, "like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable"); *Hunter*, 502 U.S. at 228-29 ("Even if we assumed, *arguendo*, that [the agents] erred . . . [they] nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken."); *Saucier*, 533 U.S. at 211 (Ginsburg, J., concurring) ("the question in this case is whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully"). In other words, an officer may not be stripped of qualified immunity for a reasonable error, even if that error results in a violation of a clearly established constitutional rule.

This aspect of the Court's qualified immunity doctrine bears emphasis here, because the Court's most recent decisions in this area have focused more on disputes about "clearly established" law, in situations where the law was arguably unsettled. In this case, the Court should clarify that there are two distinct, albeit related, strands of qualified immunity analysis, and that the objective reasonableness of the officer's conduct remains the centerpiece of the qualified immunity inquiry.

The principle that qualified immunity protects reasonable mistakes of fact as well as violations of unsettled rules of law is clear from the Court's opinions, but it also follows directly from the purposes served by the qualified immunity doctrine. The goal of the doctrine is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier*, 533 U.S. at 202 (quotation omitted). The qualified immunity standard is therefore designed to give "'ample room for mistaken

judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' . . . This accommodation for reasonable error exists because officers should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341) (citation omitted). Thus, where an officer acts on the basis of a reasonable mistake of fact or, as in this case, makes an innocent proofreading error, the policies that animate the qualified immunity doctrine apply with full force.

1. Qualified Immunity Is Applicable Where, as Here, Petitioner's Actions Would Fall Within the *Leon* "Good Faith" Rule.

This principle is underscored by the Court's holding in *Malley*, which equated the threshold for qualified immunity with the showing necessary to invoke the "good faith" rule that the courts apply in criminal cases. As the Court stated the point:

> Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon, supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. . . . Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra*, at 923, will the shield of immunity be lost.

Malley, 475 U.S. at 344-45. Holding these two standards to be equivalent is sensible for two reasons. First, it eases the practical problems for lower courts to administer all the doctrines and principles of the Fourth Amendment in civil and criminal cases. Second, it allows police to navigate the legal terrain – which is already quite treacherous – with greater simplicity and certainty about what conduct will gain them safe harbor, both in achieving their law-enforcement goals and in protecting themselves against personal liability for carrying out the duties of their job. *See also Leon*, 468 U.S. at 919 n.20 & 922 n.23 (stressing that "the standard of reasonableness we adopt is an objective one," rather than a subjective standard).

It is familiar ground that *Leon* precludes application of the exclusionary rule to evidence obtained by officers who execute a search warrant in reliance on a reasonable mistake. *See, e.g.*, *Leon*, 468 U.S. at 913-25; *Sheppard*, 468 U.S. at 987-91; *Krull*, 480 U.S. at 349-60 (same where reasonable mistake by officer was to rely on statute authorizing warrantless administrative search that was later invalidated). As the Court explained in *Leon*, where an official action is based on a reasonable mistake of fact, the deterrence rationale all but vanishes. *See Leon*, 468 U.S. at 918-20 ("where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . .the officer is acting as a reasonable officer would and should act in similar circumstances") (quotation omitted).[9]

Most notably, the *Sheppard* case, which was the companion case to *Leon*, presented a fact pattern that is virtually identical to petitioner's case. In *Sheppard*, the officer filled out an affidavit which accurately stated that the police wished to search for a number of specific items of evidence in a homicide investigation. Because the suitable warrant form was not available, the officer employed a warrant form that purported to authorize a search for controlled substances, and mistakenly failed to delete a substantive reference to "controlled substance." The magistrate reviewed the form, made changes on it, and then dated, signed, and issued the warrant; however, the magistrate (like the magistrate here) did not change the erroneous entry, and mistakenly advised the officer that the warrant was valid. *See Sheppard*, 468 U.S. at 984-86. The warrant itself did not reference the affidavit. Without again

[9] Significantly for purposes of this case, in *Leon* the Court expressly rejected as speculative and insubstantial the marginal deterrence value that might be thought to flow from suppressing evidence in order to "encourage officers to scrutinize more closely the form of the warrant." *Leon*, 468 U.S. at 928. Thus, to the extent that the Ninth Circuit's rejection of qualified immunity in this case rests on the putative benefits of forcing officers to review judicial warrants for correctness, that rationale would directly contradict this Court's instruction in *Leon*.

reviewing the warrant, the officer proceeded to execute the warrant and gathered the evidence that was specified in the affidavit but not on the warrant form. The defendant was convicted of murder and thereafter challenged his conviction on the ground that the mistake on the face of the warrant violated the particularity requirement. This Court rejected the argument, holding that the exclusionary rule does not apply where the Fourth Amendment is allegedly violated but the officer had an "objectively reasonable basis for [his] mistaken belief." *Id.* at 988. *Cf. Garrison*, 480 U.S. at 85 (where description in warrant of place to be searched was overbroad under the particularity requirement, "we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted").

Combined with *Malley*'s rule that the standard for upholding qualified immunity in a civil case is equivalent to the standard for admitting evidence in a criminal case, the holding in *Sheppard* establishes that officers are entitled to qualified immunity where their challenged action is based on a reasonable mistake of fact, such as their reasonable but mistaken belief that the warrant they executed was sufficiently particular. In sum, in cases such as this one, the pertinent question for purposes of determining the application of qualified immunity "is whether there was an objectively reasonable basis for the officers' mistaken belief." *Sheppard*, 468 U.S. at 988.

2. The Defect in This Warrant Does Not Strip Petitioner of Qualified Immunity in Light of His Overall Conduct.

Applying these legal principles to this case, petitioner's defense of qualified immunity should be upheld unless his failure to recognize the mistaken entry on the warrant was objectively unreasonable in light of all the facts and circumstances that confronted him at the time. Under this standard, it is clear that petitioner is entitled to qualified immunity.

First, it is important to underscore the nature of the alleged violation in this case. Unlike other cases in the *Bivens* and *Leon* areas, the conduct at issue in this case amounts to nothing more

than an alleged lack of due care. Petitioner simply made a mistake in preparing the draft of a warrant form for the convenience of the court – a mistake pertaining to a task that was not part of his formal responsibilities and one that the magistrate made as well. In the context of the "rapidly evolving" process of applying for a warrant, *see Saucier*, 533 U.S. at 205, mistakes of this kind are understandable and not unreasonable. *See, e.g.*, *Garrison*, 480 U.S. at 86-89; *Sheppard*, 468 U.S. at 988-990. But in any event, mere negligence is not even the appropriate constitutional standard in evaluating an officer's liability for omissions in the affidavit, much less his liability for omissions in the judicial warrant issued by the court. *See supra* Part II; *Franks*, 438 U.S. at 164-72 (falsehoods or omissions in affidavit do not invalidate a warrant unless they are intentional or made with reckless disregard; allegations of negligence or innocent mistake are insufficient). Errors of this sort – inadvertent, workaday omissions in draft court orders – are not the stuff of which constitutional violations or findings of personal liability in money damages are ordinarily made.

Second, it is undisputed that petitioner set out in his affidavit and warrant application a thorough and accurate basis for searching respondents' ranch. It is also undisputed that he specified to the magistrate with full particularity the items to be seized. These facts readily distinguish this case from cases such as *Leon*, in which the officers were alleged to have acted unreasonably by seeking a warrant based on a showing that no reasonable officer could have believed was sufficient to establish probable cause. Here, by contrast, there is no possible ground for inferring bad faith on the part of petitioner; on the contrary, the record demonstrates that petitioner made a proper showing of probable cause and specified the items to be seized with the requisite particularity. *See* Pet. App. 28a; *see also id.* at 30a-35a (elaborating basis for showing of probable cause).

Third, as explained at greater length in Part I.B, *supra*, the warrant is a judicial order issued by a court upon the proper authority of a neutral magistrate. For the convenience of the court, petitioner drafted portions of the warrant form for the

magistrate to review before issuing the order, but that fact does not alter the constitutional allocation of responsibilities between the court and the officer. *See, e.g.*, *Sheppard*, 468 U.S. at 989 ("Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."); *Garrison*, 480 U.S. at 84 (Warrant Clause erects a prohibition on a judicial officer issuing "any warrant except one 'particularly describing the place to be searched and the persons or things to be seized'"). In contrast to the application and affidavit, with respect to which petitioner acts in his official capacity as a witness and as an official applicant from the executive branch, petitioner's role with respect to the actual preparation of the judicial warrant is ministerial at most, and it would be both inappropriate and deleterious to hold him personally liable for actions that are more properly understood as the legal responsibility of the judicial branch. *Cf. Sheppard*, 468 U.S. at 990-91 ("Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve.").

Fourth, petitioner's generally proficient course of conduct in applying for and executing the warrant provides the backdrop against which the reasonableness of his actions must be judged. *See, e.g.*, *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact"). In particular, the thorough justification for the search that petitioner presented in the application for the warrant, and his fidelity to those constraints in carrying out the search of respondents' ranch, negate any inference that his larger course of conduct, including any proofreading error, was unreasonable. *See, e.g.*, *Sheppard*, 468 U.S. at 991 (evaluating reasonableness of overall course of conduct, not simply failure

to review warrant in isolation; "[i]n sum, the police conduct in this case clearly was objectively reasonable and largely error-free").

This point bears emphasis given the lower court's harsh castigation of petitioner (though not of any other agent on the case) on the theory that the "warrant was so facially deficient . . . that had Groh read it, 'he could not reasonably [have] presume[d] it to be valid.'" *See* Pet. App. 10a (quoting *Leon*, 468 U.S. at 923). Thus, as explained in more detail above, *see* Part I.B.2, *supra*, the court of appeals subtly, and improperly, imposed a newfangled duty to proofread the warrant sheet, and then went on to find that petitioner's failure to correct the erroneous entry in the judicial warrant conclusively precluded any defense of qualified immunity. The rigidity of this approach completely ignored petitioner's overall conduct in gathering evidence, applying for the warrant, and executing the search, all of which were tasks that he performed in objectively reasonable fashion. Perhaps more importantly for present purposes, the court of appeals applied an improper and unrealistic "hindsight" analysis to petitioner's action, rather than viewing it in light of all the facts and circumstances relevant at the time of a fast-developing warrant application on the ground. *See, e.g.*, *Garrison*, 480 U.S. at 85 ("we must judge the constitutionality of their conduct in light of the information available to them at the time they acted"); *Saucier*, 533 U.S. at 205 ("police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving").

Indeed, the *post-hoc* approach taken by the court of appeals would likely give rise to liability (or at least defeat the argument for qualified immunity) for almost *any* proofreading error, however inadvertent and understandable it may have been. That is, of course, exactly the sort of dragnet result that the qualified immunity doctrine was designed to prevent. For in hindsight, almost *all* proofreading errors appear to be obvious, often excruciatingly so. Few authors have not had the unhappy experience of sending out a manuscript that was carefully edited and repeatedly proofread, only to discover later a glaring error that in isolation stands out like a sore thumb. That is in the

nature of proofreading errors – they elude attention when made and monopolize it once discovered. It was particularly inappropriate for the court of appeals to subject petitioner to personal liability based on the court's retrospective confidence that the error should have been caught, particularly when there was no suggestion of bad faith and when the error occurred in the drafting of a judicial order intended to aid the court in its own judicial function, rather than as any necessary part of the executive function.

The record in this case shows that the petitioner methodically gathered evidence to establish probable cause; carefully prepared a thorough warrant application; swore out an affidavit that clearly established a legally sufficient basis for a search; sought and received judicial authority to undertake the search; and executed the warrant in a completely professional manner. Far from having been "plainly incompetent" or "knowingly violate[d] the law," *Malley*, 475 U.S. at 341, petitioner's overall course of conduct was responsible, "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990. And under this Court's teachings on qualified immunity, petitioner cannot be subjected to personal liability for money damages merely because of an inadvertent failure to notice an error in a judicial order, even if in hindsight it may appear obvious to an appellate court reviewing the cold record that the error should have been detected.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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